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No. 87-1

In the Supreme Court of the United States

OCTOBER TERM, 1987

HANSEN BROTHERS ENTERPRISES, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the National Labor Relations Board (NLRB) erred in finding that petitioner had not permanently replaced its striking employees and that it therefore violated Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act, 29 U.S.C. 158(a)(1) and 158(a)(3), when it refused to reinstate the striking employees upon their unconditional offer to return to work.

2. Whether, in the circumstances of this case, the NLRB abused its discretion in considering the exceptions that the Union filed to the administrative law judge's decision.

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OPINIONS BELOW

The memorandum opinion of the court of appeals (Pet. App. B) is not officially reported. The decision and order of the National Labor Relations Board (Pet. App. E1-E13), and the decision of the administrative law judge (Pet. App. E14-E19), are reported at 279 N.L.R.B. No. 98.

JURISDICTION

The judgment of the court of appeals (Pet. App. A) was entered on March 12, 1987. A timely petition for rehearing and suggestion of rehearing en banc was denied on April 28, 1987 (Pet. Apps. C, D). The petition for a writ of certiorari was filed on June 26, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner compounds and transports wet concrete for use in construction projects (Pet. App. E14-E15). Petitioner's collective bargaining agreement with the Chauffeurs, Teamsters and Helpers Local Union No. 150, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the Union), expired on July 1, 1983 (*id.* at E15). On August 18, 1983, all of the employees that the Union represented commenced an economic strike (*ibid.*).

Eleven days later, on August 29, 1983, petitioner sent a letter to each striking employee advising that it would continue operating during the strike, that it was receiving many applications for the striking employees' positions, and that, if it hired replacements, a striking employee "may lose [his] right to reemployment if [he] later change[s] [his] mind and wish[es] to come back to work" (Pet. App. E3 n.5). Since the striking employees did not immediately return to work, petitioner began hiring replacement employees (Pet. 4). Petitioner's president told various replacements that he "wanted" them to be permanent, but he cautioned that "things could happen" and that, because of ongoing labor problems and negotiations, he could not promise how long they would be employed (Pet. App. E3, E8 & n.2, E18; C.A. App. 140-145).[1] By September 7, 1983, petitioner had hired seven strike replacements (Pet. 4).

On September 7, 1983, the Union's business agent, Frank Lomascola, met with petitioner's attorney for labor relations, Aubrey Hubbert, and proposed that the striking drivers be allowed to return to work under the terms of the expired contract (Pet. App. E15). Hubbert indicated that this arrangement would be agreeable to petitioner, so

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[1] C.A. App. refers to the printed appendix to the briefs filed by the parties in the court of appeals.

Lomascola consulted the strikers, who voted unanimously to return to work (*ibid.*). Lomascola informed petitioner's president of the vote, but petitioner's president told Lomascola that he would have to contact Hubbert (*ibid.*), which Lomascola did later that evening (*id.* at E16). Hubbert was unresponsive at the time, though he subsequently indicated that two specific individuals, chosen by petitioner because of their skills, would be recalled the next day (*ibid.*). Lomascola replied that these two employees had less seniority than other striking employees and that the return of only those two employees to work, based on petitioner's evaluation of their skills, was unacceptable (*ibid.*). The matter then lay dormant for several days (*ibid.*).

During a negotiating session held on September 13, 1983, the Union again raised the question of the strikers' return to work (Pet. App. E16). Hubbert responded that petitioner was concerned about a case "back East" in which an employer had been held liable for damages to permanent replacements who were discharged (*ibid.*).[2] The Union, however, said that any such liability was petitioner's problem and that all replacements had to be released as a condition of the strikers' return to work (*ibid.*). Petitioner was unwilling to take this action and did not allow the striking employees to return to work (*ibid.*).

On September 30, 1983, at the next bargaining session, the Union again asked whether the strikers could return to work (Pet. App. E16). Hubbert responded that petitioner was not prepared to bring any strikers back to work, but offered to recall strikers on the basis of seniority as openings occurred (*ibid.*). The Union rejected this offer and instead filed unfair labor practices charges with the National Labor Relations Board (*id.* at E14, E16).

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[2] Hubbert was apparently referring to this Court's decision in *Belknap, Inc.* v. *Hale*, 463 U.S. 491 (1983).

2. With Chairman Dotson dissenting, the Board held that petitioner had violated Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act (NLRA), 29 U.S.C. 158(a)(1) and 158(a)(3), by refusing to reinstate the strikers after their unconditional offer to return to work (Pet. App. E1-E13). Noting that "[i]t is well established that economic strikers are entitled to immediate reinstatement upon an unconditional offer to return to work, provided their positions have not been filled by permanent replacements" (*id.* at E2), the Board found that the Union's offer on behalf of the employees to return to work was "unconditional" (*ibid.*)[3] and that "petitioner failed to establish that any of the striker replacements were hired as permanent employees" (*ibid.*). With respect to this latter finding, the Board stressed that petitioner's "letter to the strikers stated only that the strikers 'may' lose their right to reemployment if a replacement was hired for their position," that petitioner's "statements to the replacements are similarly noncommittal," and that petitioner "failed to present any evidence whatsoever that the replacements understood that they were being hired as permanent employees" (*id.* at E3-E4). And with respect to the former finding, it denied petitioner's motion to strike the Union's exceptions to the administrative law judge's decision (because of nonconformity with Board rules), reasoning that, "[a]lthough the [Union's] exceptions are in the nature of a brief and do not contain an alphabetical listing of authorities relied on, they do set forth the questions of fact and law to which exceptions are taken, identify that part of the judge's decision to which objection is made,

[3] The Board rejected the suggestion that the strikers had not unconditionally offered to return to work because the Union's offers on their behalf were conditioned on the discharge of the replacements (Pet. App. E2). The Board held that, since the replacements were not permanent, the demand for their discharge did not render the offer to return to work conditional (*ibid.*).

designate by precise citation of page the portions of the record relied on, and state the grounds for the exceptions" (*id.* at E1 n.1). It then ordered petitioner to offer the strikers reinstatement and backpay and to post an appropriate notice (*id.* at E5-E6).

3. The court of appeals, in an unpublished memorandum opinion, upheld the Board's decision and enforced its order (Pet. App. B).

ARGUMENT

The decision below is correct. It does not conflict with any decision of this Court or with the decision of any other court of appeals. Accordingly, review by this Court is unwarranted.

1. Petitioner's principal claim (Pet. 12-17) is that the Board's decision conflicts with *Belknap, Inc.* v. *Hale*, 463 U.S. 491 (1983). This contention is without merit.

In *Belknap*, the Court held that the NLRA did not preempt a lawsuit brought under state law for misrepresentation and breach of contract by strike replacements who were displaced by reinstated strikers after having been offered and accepted jobs on a permanent basis and after having been assured that they would not be fired to accommodate returning strikers. In so holding, the Court rejected the employer's argument, supported by the Board in an *amicus* brief, that "[a]n employment contract with a replacement promising permanent employment, subject only to settlement with its employees' union and to a Board unfair labor practice order directing reinstatement of strikers, * * * 'might' render the replacements only temporary hires that the employer would be required to discharge at the conclusion of a purely economic strike" (463 U.S. at 503). The Court reasoned that "the permanent-hiring requirement is designed to protect the strikers, who retain their employee status and are entitled to reinstatement unless they have been permanently

replaced," that "the protection is of great moment if the employer is not found guilty of unfair practices, does not settle with the union, or settles without a promise to reinstate," and that, "[i]f [the employer] has promised to keep the replacements on in such a situation, * * * [t]hose contracts * * * create a sufficiently permanent arrangement to permit the prevailing employer to abide by its promises" (463 U.S. at 503-504).

Belknap is completely consistent with the Board's decision here. *Belknap* indicates only that "[a]n employment contract with a replacement promising permanent employment, subject *only* to settlement with its employees' union and to a Board unfair labor practice order directing reinstatement of strikers," is sufficient to make a replacement a permanent employee (463 U.S. at 503 (emphasis added)). See also *id.* at 504 & n.8. Here, by contrast, the Board found that petitioner made no promise of permanent employment to the replacement employees and that the replacements did not in fact understand their employment to be permanent (Pet. App. E2-E4).[4] Thus, the decision in *Belknap,* concerning replacement hires who were offered permanent employment and understood that their employment was permanent subject only to specific conditions subsequent, is entirely inapposite.

2. Petitioner next contends (Pet. 18-24) that, by considering the union's exceptions to the findings of the administrative law judge, the Board has arbitrarily and capriciously applied its Rules and Regulations. Petitioner correctly notes that the Board's rules specify the form that exceptions to administrative law judge findings must take

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[4] Petitioner apparently challenges (Pet. 15-17) these factual findings. But the factual findings were affirmed by the court below and are supported by substantial evidence. See Pet. App. E2-E4, E18. Accordingly, they do not merit review by this Court. See *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474, 491 (1951).

and that the Union did not strictly follow those rules.[5] But petitioner fails to note that the Board found that the Union's exceptions substantially complied with the rules and that no prejudice to petitioner would result from its consideration of those exceptions in this case. See Pet. App. E1 n.1. In such circumstances, the Board is entitled to consider the exceptions notwithstanding the nonconformity with its rules—as the applicable rule itself makes clear by specifying that an exception that fails to comply with the rule's requirements "*may* be disregarded * * *" by the Board (29 C.F.R. 102.46(b) (1985) (emphasis added)). See *Local 851, Int'l Brotherhood of Teamsters,* 268 N.L.R.B. 452 n.1 (1983), enforced, 732 F.2d 43 (2d Cir. 1984); see generally *American Farm Lines* v. *Black Ball Freight Service,* 397 U.S. 532, 539 (1970) ("[i]t is always within the discretion of * * * an administrative agency to relax or modify its procedural rules * * * when in a given case the ends of justice require it. [Its] action * * * in such a case is not reviewable except upon a showing of substantial prejudice to the complaining party"); *NLRB* v. *Paper Art Co.,* 430 F.2d 82, 84 (7th Cir. 1970) ("the Board is empowered to construe its own rules free of judicial review unless its construction is so arbitrary as to defeat justice"); 29 C.F.R. 102.121 (NLRB Rules and Regulations are to be "liberally construed to effectuate the purposes and provisions of the [A]ct").

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[5] The NLRB's Rules and Regulations, Series 8 as amended, 29 C.F.R. 102.46(b) (1985), provide:

> Each exception (1) shall set forth specifically the questions of procedure, fact, law, or policy to which exceptions are taken; (2) shall identify that part of the administrative law judge's decision to which objection is made; (3) shall designate by precise citation of page the portions of the record relied on; and (4) shall state the grounds for the exceptions and shall include the citation of authorities unless set forth in a supporting brief. Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged shall be deemed to have been waived. Any exception which fails to comply with the foregoing requirements may be disregarded.

3. Finally, petitioner advances (Pet. 24-29) a series of insubstantial reasons why these economic strikers were not entitled to reinstatement.

(a) Petitioner's assertion (Pet. 25-27) that the Union placed five separate conditions on the striking employees' offer to return to work simply takes issue with the Board's contrary factual finding that the Union placed only one condition on the employees' offer—*viz.*, that petitioner must discharge the temporary replacements in order to make room for the returning strikers (Pet. App. E2). This finding, affirmed by the court below, does not merit review by this Court and is amply supported by the record.[6] The cases that petitioner cites (Pet. 26-27) are inapposite because they involved different conditions placed on the employees' offer to return to work.[7]

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[6] The record shows that the Union repeatedly requested that the striking employees be allowed to return to work as a group, that petitioner repeatedly refused to allow them to do so, and that the Union's only condition for returning the employees to work was that their temporary replacements be discharged. See Pet. App. E16. Petitioner errs in suggesting (Pet. 25-26) that the administrative law judge found that the Union placed five separate conditions on the employees' offer to return to work. To be sure, the administrative law judge noted that petitioner had "advanced five separate grounds upon which to contend that conditions have always attached to the offers" (Pet. App. E18). But he did not specify the five conditions set out by petitioner and the language quoted by petitioner is not taken from his decision. To the contrary, while he found that the strikers' offer to return to work was conditional, he did so only because the Union insisted that the strike replacements had to be discharged (*ibid.*). The Board rejected this conclusion, accepting the administrative law judge's factual findings (*id.* at E1 n.2, E2), but holding that the union was legally entitled to insist that the replacements be discharged because they were only temporary (*id.* at E2-E3).

[7] *Coastside Scavenger Co.*, 273 N.L.R.B. 1618, 1630 (1985), *Times Herald Printing Co.*, 221 N.L.R.B. 225, 229 (1975), and *Lone Star Industries*, 279 N.L.R.B. No. 78 (Apr. 28, 1986), slip op. 2), involved situations where the striking employees were permanently replaced.

(b) Petitioner similarly errs in suggesting (Pet. 27-28) that the General Counsel of the NLRB has the burden of showing that the offer to return to work is unconditional. The courts of appeals uniformly have upheld the Board's placing of the burden of showing that the offer to return to work is conditional on the employer. See, *e.g.*, *Soule Glass and Glazing Co.* v. *NLRB,* 652 F.2d 1055, 1107 (1st Cir. 1981); *NLRB* v. *Okla-Inn,* 488 F.2d 498, 505 (10th Cir. 1973). See generally *NLRB* v. *Fleetwood Trailer Co.,* 389 U.S. 375, 378 (1967).

(c) Petitioner's contention (Pet. 28-29) that a lack of work justified its refusal to reinstate the strikers simply raises another factual issue that is unworthy of review by this Court. See *Univeral Camera Corp.* v. *NLRB,* 340 U.S. 474, 491 (1951). In any event, the record shows that petitioner's "slow season" was in the winter (Tr. 16, 84),[8] not in September when the employees made their offer to return to work. And while petitioner suggests that its workload declined because of the departure of employees not represented by the Union, the record contains no evidence indicating that work had actually declined or that petitioner was unable to make use of its full driver complement. Thus, the Board was justified in rejecting this claim. See *NLRB* v. *MFY Industries, Inc.,* 573 F.2d 673, 675 (10th Cir. 1978).

Robert's Oldsmobile, Inc., 252 N.L.R.B. 192, 193 & n.2 (1980), involved striking employees who refused to return to work and work alongside replacement employees. And *Mid-County Transit Mix, Inc.,* 264 N.L.R.B. 782, 790 (1982), involved striking employees who conditioned their offer to return on the progress of negotiations.

[8] Tr. refers to the transcript of the hearing before the administrative law judge.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1987

U.S. GOVERNMENT PRINTING OFFICE: 1987—181-483/40492